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No. 55

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

AMERICAN AIRLINES, INC., *Petitioner,*

v.

NORTH AMERICAN AIRLINES, INC., *Respondent*
and the
CIVIL AERONAUTICS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE OF PETITIONER TO MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD RESPECTING POSSIBLE MOOTNESS

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I. ***The Case Is Not Moot.***

We agree with the position of the Government, as expressed in its memorandum of August 25, 1957, that this case is not moot. (Memorandum, pp. 5-8). In this connection, we think it significant that, so far as we have been able to determine, respondent has neither dissolved its corporate structure nor has it abandoned its claim to use of the word "American" in its trade name. It is also noteworthy that subsequent to this Court's prior decision in this same case, wherein it upheld the authority of the Civil

Aeronautics Board to bar respondent's use of the "North American" name, respondent switched its trade name from "North American" to "Trans American"—despite the fact that respondent had never previously used that name and the fact that the Board's order ran against that name as well as against "North American". Even today respondent remains an applicant under various Board dockets, including Nos. 7869 and 7977, for authorization to operate as a common carrier.

These elements, and the facts cited by the Government in its memorandum, show that the instant case is not moot. There is a distinct possibility of resumption of the name "Trans American" by respondent. *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 448 (2d Cir. 1945). Respondent has retained its corporate entity. See *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F.2d 331, 334 (8th Cir. 1944). Respondent's applications for renewed common carrier authority are pending before the Board. Respondent's past conduct, in particular its shift to the "Trans American" name, affords no basis for any faith in respondent's future *bona fides*. See *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953). On the question of possible mootness it is also significant, as noted by the Government, that this is not a private law suit but a statutory proceeding initiated by an administrative agency for the protection of the public. (Memorandum, pp. 7-8).

However, in the event that the Court should consider the case moot, we concur in the position taken by the Government as to the proper disposition of the case. (Memorandum, pp. 8-9).

II. *The Issues Presented by the Petition for Certiorari Are Still Important.*

The issues now before this Court on certiorari have a broad interest and significance which in no way have been diminished by the fact that respondent, in response to another court order, has halted operations as a common carrier. There is accordingly no reason for the Court to vacate its previous grant of certiorari.

1. Prior to the decision below, it had been established that in reviewing agency action an appellate court must limit itself to the objections urged before the agency. This was true both in cases where no specific limitation was imposed upon the reviewing court by statute, *U. S.* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37 (1952) and where such limitations were embodied, as here, in the controlling statute, *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498-499 (1955). In the instant case, the statutory language could hardly have been more unequivocal. Section 1006(e) of the Civil Aeronautics Act, 49 U.S.C. 646, provides:

> "No objection to an order of the [Civil Aeronautics] Board shall be considered by the [reviewing] court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so."

Ignoring this flat prohibition, the court below ruled *sua sponte* upon the scope of remedy ordered by the Board. It affirmed that part of the Board's order which prevented respondent from using the "North American" name but set aside the part of the order which would have prohibited respondent's use of other

names embodying the word "American", such as "Trans American"—a name which the respondent adopted after this Court had upheld the Board's authority to prohibit use of the North American name. But respondent had never objected to the scope of the remedy ordered by the Board; indeed, in its brief to this Court in opposition to the petition for certiorari, *respondent admitted that this was the fact.* (Br. in Opp., p. 2). In other words, the court below ruled on an issue which respondent had never advanced to the Board.

The essence of respondent's case is simply that use by respondent of other "American" names (besides "North American") had been before the Board because one Board member in his dissent had urged that respondent should not be denied the name "North American" but rather should be permitted to continue using it—subject to the condition that respondent make more clear in its advertisements and public contacts that it was "not to be confused with petitioner American Airlines". (Pet., p. 21a).

But this dissent, of course, related only to continued use of the "North American" name; it did not touch on respondent's possible use of other names embodying the word "American". The decision below thus raised a vital question: Can a reviewing court consider any conceivable new objection or objections to the agency remedy whenever another objection, no matter how unrelated its thrust, had been before the agency. We submit that the affirmative answer rendered by the court below would vitiate, in large measure, the salutary doctrine of the *Colorado*

Interstate line of cases. It would mean that:

> ". . . every litigant before administrative agencies who contemplates seeking review in the District of Columbia Circuit will be encouraged to keep an ace up its sleeve. For after losing all disputed points the litigant is given strong hope that it will still be able to keep litigation alive by modifying its conduct in some minor respect and then starting anew on questions going to the scope of the remedy. The administrative process, already sufficiently slow, cumbersome, and expensive, would be irreparably harmed by the piecemeal treatment of issues invited by the lower court here." (Pet., p. 20).

In any event, it is vital now as before—to litigants, agencies and the lower courts—to have this matter settled once and for all by this Court.

2. The decision below also confused the public's right to protection from statutory unfair practices with a private person's right to protection from private law unfair competition. In so doing, the court below not only ignored principles established by this Court and other Courts of Appeals but also injected serious confusion into still another important area of administrative law—the extent of agency discretion in shaping remedies to meet admitted law violations.

In its earlier decision in this case, this Court held that the Board's findings of confusion supported a cease and desist order. *American Airlines* v. *North American Airlines*, 351 U.S. 79 (1956). The case was remanded to the lower court for a determination as to whether these findings were supported by the evidence. The lower court held that they were so supported and hence concluded that the Board had properly ordered respondent to cease using the "North American" name.

But the lower court then went ahead—gratuitiously, we believe—and set aside that part of the Board's order which would have reached other variations of the word "American" in a trade name on the ground that there was insufficient evidence to support a finding that petitioner had acquired "secondary meaning" in the name "American". (Pet., p. 2a).

But, as the Board itself had held, the existence or nonexistence of "secondary meaning" has significance only in private suits involving private property rights. This is not such a case. It is a statutory proceeding, based on Section 411 of the Civil Aeronautics Act, a public protection section modeled on Section 5 of the Federal Trade Commission Act. And as this Court in its earlier decision made abundantly clear, the Board is concerned "not with punishment of wrongdoing or protection of injured competitors, but rather with protection of the public interest." 351 U.S. at 85. Thus, the only question before the court below—even if the question had been properly raised—was whether the Board could forestall continued public confusion by eliminating "what we find to be the cause of such confusion" (Pet., p. 12a)—*i.e.*, any use of the word "American" by respondent.

And in striking down the Board's order, the court below also violated previously-accepted principles on agency discretion—*i.e.*, an agency must be accorded "wide latitude for judgment"; the remedial order need only have a "reasonable relation to the unlawful practices found to exist", *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613, 614 (1946); an agency is "not limited to prohibiting the illegal practice in the precise form in which it

is found to have existed in the past," *Federal Trade Commission* v. *Ruberoid Co.*, 347 U.S. 470, 473 (1952). The decision also ran counter to the settled course of remedial orders issued by the Federal Trade Commission over three decades in disposing of trade name problems under the analogous Section 5 of the Trade Commission Act. See *e.g.*, *Galter* v. *Federal Trade Commission*, 86 F.2d 810 (7th Cir. 1951), *cert denied*, 342 U.S. 818 (1951); *Federal Trade Commission* v. *Real Products Corp.*, 90 F.2d 617 (2d Cir. 1937).

The decision takes on particular significance because of the growing importance of Section 411 in the air transportation field. This is a field where competition has intensified at a rapid pace in recent years through route extensions, proliferation of types of services, certification of new carriers (both freight and passenger), emergence of numerous freight forwarders and the activities of hundreds of travel agents. This tremendous growth has rendered extremely complex the task of informing the public of available air services with reasonable accuracy.

But the public cannot secure reliable information if the names of separate carriers are confusingly similar. The Board's primary tool for coping with this problem is Section 411. It is therefore increasingly important to determine whether this section is to be so construed as to give the Board sufficient power to protect the public or whether it is to be given a narrow and ineffective construction by the interpolation of private law doctrines as urged by

the court below. This question also merits prompt and definitive resolution by this Court.

Respectfully submitted,

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